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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LAKISHA FARROW, Plaintiff and Appellant, v. CARNIVAL CORPORATION et al., Defendants and Respondents.	B152882 (Los Angeles County Super. Ct. No. BC 219813)

APPEAL from a judgment of the Superior Court of Los Angeles County. James C. Chalfant, Judge. Affirmed.

Akudinobi & Ikonte, Emmanuel C. Akudinobi and Chijioke O. Ikonte for Plaintiff and Appellant.

Epstein Becker & Green, Thomas P. Brown and Sherry B. Kampler for Defendants and Respondents.

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In this sexual harassment case, plaintiff and appellant Lakisha Farrow, a lounge singer, obtained a jury verdict in her favor against defendants and respondents Carnival Corporation dba Carnival Cruise Lines, her former employer, and Gerald Dahir, her former bandleader, including punitive damages against Dahir. Prior to trial, respondents filed a motion in limine to preclude the jury's consideration of punitive damages. After the close of evidence at trial, the court granted the motion as to Carnival. Farrow appeals this ruling. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Complaint

In February 2001, Farrow, a female African-American, filed a first amended complaint against respondents alleging various claims for sexual and racial harassment, defamation and intentional infliction of emotional distress.[1] Farrow alleged the following: She began her employment with Carnival on December 18, 1998 as a singer with the band "Slip a da Hip" onboard one of Carnival's cruise ships, the M/S Holiday. Beginning the first day of her employment, Dahir, the band leader, made inappropriate comments to her of a sexual and racial nature, both onstage and offstage. Farrow complained to the assistant cruise director, Marahsealh Stanton, in February 1999, and to the music director, Rich Ellis, in March 1999. Later that month, Farrow met with Ellis and the new cruise director, Peter Gibbs, who gave her a writeup for being late to performances. Dahir continued to make inappropriate remarks. In April 1999, Farrow complained to "another manager" Keith Bunton, and to Carlo Calloni, staff captain. On or about May 3, 1999, Farrow "signed off" the M/S Holiday. Farrow sought compensatory damages of at least $2 million and punitive damages of at least $10 million.

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[1] After the close of Farrow's case during trial, the court granted respondents' motion for nonsuit on Farrow's claims for racial discrimination and harassment, defamation and negligent hiring and supervision.

The Trial

The case proceeded to jury trial in May 2001. Inexplicably, Farrow omits from the record on appeal the reporter's transcripts of the first days of trial. Instead, the transcript essentially begins with Farrow's cross-examination. She testified that the first time she put her complaints in writing was in a report to David Miller, dated April 16, 1999. This report was admitted at trial. Also admitted were excerpts from Farrow's diary, e-mails between Carnival employees, an investigation report by Carnival's internal investigator, Charles Schuh, and seafarer's agreements.

The record before us discloses that the following witnesses also testified: David Miller, entertainment supervisor; Rich Ellis, musical director; Keith Bunton, hotel director; Troy Linton, cruise director (only his cross-examination is included); and Dahir. Videotapes of the depositions of Marahsealh Stanton, assistant cruise director, and Peter Gibbs, cruise director, were played for the jury; portions of the transcripts are included in the record.

David Miller testified that he was the entertainment supervisor who was responsible for hiring the lounge bands on each ship, but that he had no authority to discipline. Rich Ellis reported directly to Miller. Miller was not stationed onboard the ship. The first time Miller became aware of problems in connection with Farrow was in a phone conversation with cruise director Linton in March 1999, who advised him of "friction" between Farrow and Dahir. Linton told him that Farrow was unhappy with the band and wanted to rehearse more often, and that she had an objection to the way she was being addressed by Dahir onstage. Miller spoke to Dahir, who denied any wrongdoing, and Miller told Dahir not to make any inappropriate comments. Miller testified that the first time he heard about Farrow's allegations of sexual harassment was in a phone conversation with Keith Bunton in April 1999. Miller testified that he received Farrow's written report of her complaints and "advised my manager in our legal department [Bryan Horta] that I was in receipt of this document." He also testified that he helped Farrow find a position with a band on another one of Carnival's ships.

Keith Bunton testified that as the hotel director he was in charge of guest services on board the ship. Bunton testified that when Farrow complained to him of harassment, he informed David Miller, who instructed him to investigate. Bunton spoke to Dahir, who denied the accusations, and told Dahir that such behavior would not be acceptable. Bunton also informed his supervisor, the captain, of the allegations, and also told the cruise director. Bunton then frequented the band's performances and did not observe any inappropriate behavior by Dahir. Bunton was not aware of the outcome of any other investigation by Carnival.

Rich Ellis testified that Farrow spoke to him in March 1999 about derogatory comments Dahir was making to her. Ellis later had a meeting with Dahir and cruise director Linton in which Dahir denied the accusations and complained about Farrow's poor performance onstage and being late to performances. Another meeting was held between Ellis, Dahir and Gibbs in which Dahir stated that he thought Farrow should be terminated for being a poor performer. Gibbs informed Dahir that proper procedures would need to be followed. In a further meeting between Ellis, Gibbs, Farrow and Dahir, Farrow and Dahir argued and accused each other of lying. Ellis testified that his role in enforcing Carnival's sexual harassment policy is to write up any wrongdoing and take it up with his supervisor, the cruise director. Ellis stated that he is not the head of his department. He also testified that he never believed Farrow was complaining about sexual harassment by Dahir.

In the portion of cruise director Troy Linton's testimony in the record, he testified that Farrow complained to him about a joke Dahir had made onstage about her butt, and Linton told Dahir to avoid such comments and warned him of the consequences.

Dahir testified that he was unhappy with Farrow's performances from her very first performance -- she had not learned songs she had promised to learn, she showed up late for gigs, she dressed inappropriately and did not engage with the audience or partake in the band's banter. He testified that he wanted to terminate her, but did not have the authority to do so. He testified that the first time he learned of Farrow's accusations

against him was in a meeting with Bunton and Gibbs. At trial, he denied all of Farrow's accusations.

In the portions of the deposition testimony of Marahsealh Stanton and Peter Gibbs presented at trial, Stanton testified that Farrow complained about sexual innuendos by Dahir, but that she never put him on notice of problems regarding Carnival's sexual harassment policy. Gibbs testified that he was the cruise director on the M/S Holiday from March 1999 to August 1999 and that Farrow never complained to him that Dahir was creating a sexually offensive environment.

The Motion in Limine

Prior to trial, respondents filed a "motion in limine re preclusion of a request for punitive damages or, in the alternative, for bifurcation of trial." Respondents based the motion on three grounds: (1) Dahir was not a "managing agent," (2) Carnival did not ratify any alleged harassment by Dahir, and (3) Carnival did not act with oppression, fraud or malice. Farrow opposed the motion. The trial court deferred ruling on the motion until after the close of evidence at trial. At that time, the parties renewed their arguments. Farrow's counsel clarified that her position was that David Miller was the "managing agent" for Carnival. Relying on the case of *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, the trial court concluded that Farrow had not shown that Miller or anyone else involved was a managing agent sufficient to hold Carnival liable for punitive damages. The court therefore granted the motion as to Carnival.

The Judgment

The jury returned a special verdict in favor of Farrow and made the following findings: (1) respondents were liable for sexual harassment based on a hostile work environment, (2) Carnival was liable for retaliation and failure to prevent harassment, and (3) Dahir was liable for intentional infliction of emotional distress, as well as oppression, fraud and malice. The jury awarded damages to Farrow in the amount of $85,000 against

Carnival, and $23,500 against Dahir, including punitive damages against Dahir in the amount of $2,500. Judgment was entered accordingly on June 19, 2001.

DISCUSSION

Standard of Review

Because the trial court deferred ruling on the motion in limine until after all the evidence had been presented at trial, we treat it as tantamount to a motion for nonsuit or directed verdict. In such a case, the standard of review is the same as for a nonsuit. (*Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 Cal.App.4th 672, 676.) "'A motion for nonsuit or demurrer to the evidence concedes the truth of the facts proved, but denies as a matter of law that they sustain the plaintiff's case. A trial court may grant a nonsuit only when, disregarding conflicting evidence, viewing the record in the light most favorable to the plaintiff and indulging in every legitimate inference which may be drawn from the evidence, it determines there is *no* substantial evidence to support a judgment in the plaintiff's favor. [Citations.]'" (*Id*. at p. 677, quoting *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15*,* 27-28.) Where the issue of punitive damages is involved, we must inquire whether the record contains substantial evidence to support a determination of fraud, oppression or malice by clear and convincing evidence. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc*. (2000) 78 Cal.App.4th 847, 891.)

The Motion in Limine was Properly Granted

Farrow contends that (1) the trial court erred in finding that none of the employees involved was a "managing agent," (2) there was substantial evidence that Carnival acted with malice, fraud or oppression, and (3) there was substantial evidence that Carnival ratified Dahir's unlawful conduct.

Under Civil Code section 3294, subdivision (a), a plaintiff may recover punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice . . . ." Under subdivision (b), however, an

employer shall not be liable for such damages based upon acts of its employee unless the employer "authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the . . . authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

The parties, as did the trial court, rely on the case of *White v. Ultramar, Inc.*, *supra*, 21 Cal.4th 563 (*White*) for the definition of "managing agent." Reviewing the legislative history of Civil Code section 3294, subdivision (b), our Supreme Court in *White* concluded: "The managing agent must be someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy." (*White*, at p. 573.) "[S]upervisors who have no discretionary authority over decisions that ultimately determine corporate policy would not be considered managing agents even though they may have the ability to hire or fire other employees. In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*Id*. at p. 577.)

Although Farrow's opening brief is confusing as to who she claims was a "managing agent," she appears to focus on those Carnival employees to whom she complained prior to preparing her written report to David Miller. Farrow asserts that she complained "to her various Heads of Department," and identifies Stanton, Ellis, Linton and Gibbs. Farrow also states, "Ironically, Mr. Miller, the person whom the written complaint finally ended up on his desk, had constructive knowledge of Ms. Farrow's sexual harassment allegations prior to March 8, 1999, the date Mr. Linton signed off as the Cruise Director of the M/S Holiday and he communicated the information to their legal department."

To the extent Farrow is attempting to argue that Stanton, Ellis, Linton and Gibbs were managing agents, this position is contrary to the one taken by Farrow below. In oral arguments before the trial court, Farrow's attorney stated the following: "It is not our

position that Peter Gibbs was a managing agent. . . . [¶] . . . The managing agent -- it is -- Mr. Dave Miller referred it to the legal department. He mentioned his name. [¶] Bryan Horta, his manager, who was in charge was notified. Then he notified the legal department." Where Farrow takes a different position on appeal, we will not entertain it. "A party is not permitted to change his position and adopt a new and different theory on appeal." (*Richmond v. Dart Industries, Inc*. (1987) 196 Cal.App.3d 869, 874.)[2]

Farrow does not identify Bryan Horta as a managing agent in her opening brief. This leaves only David Miller. But Farrow presented *no* evidence, let alone substantial evidence, that Miller "exercise[d] substantial discretionary authority over decisions that ultimately determine corporate policy." (*White, supra*, 21 Cal.4th at p. 573.) The evidence presented at trial showed that Miller, who did not work aboard the M/S Holiday, was entertainment supervisor during the relevant time frame, and was involved in staffing the lounge bands onboard the vessels. Miller testified that he "took care of all the logistics of the turnover of people, making sure that their passports, birth certificates, all the logistics of getting them to and from the vessels, also the turnover of the ship's movies, purchasing and interfacing with vendors, budgetary issues, tracking the budget, managing the budget and all that." Miller testified that there are two lounge bands, one calypso band and two or three soloists per ship, and "[t]hat was my area of operation." He was responsible for hiring all of the bands and soloists on each ship, but was not responsible for disciplining them, and only in rare cases was he part of the termination process. There was no further evidence presented relating to his duties and authority. Indeed, Miller testified that when he received Farrow's written report of her complaints, he passed it on to Carnival's legal department, and it is not clear from the record what further role, if any, he played in the matter. There was simply no evidence from which to

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[2] Indeed, were we to entertain Farrow's arguments, we note that Ellis specifically testified that he was "*not* the head of the department [italics added]." Moreover, there is no substantial evidence that Ellis, Stanton, Linton or Gibbs, employees who worked aboard the M/S Holiday, were managing agents with discretionary authority to determine Carnival's corporate policy.

infer that because Miller had authority over one narrow area of Carnival's multi-faceted operations, i.e., deciding which movies would be played on the ships and which bands would entertain the guests, that he exercised substantial discretionary authority over significant corporate principles. (See, e.g., *Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 168.)

Farrow contends that the issue of managing agent is a question of fact for the jury to decide and that the trial court invaded the jury's province by granting the motion in limine. While it is true that the determination of whether an employee is a managing agent must be made on a case by case basis (*White*, *supra*, 21 Cal.4th at p. 567), it is equally true that where there is no substantial evidence to support a verdict in the plaintiff's favor, there is no issue for the jury to decide. If this were not the case, motions for directed verdict and nonsuit would not exist. As the trial court aptly concluded, "[y]ou could . . . have shown who the managing agents were, but it has not been shown in this case." We likewise conclude that, viewing the evidence in the light most favorable to Farrow, there was no substantial evidence that Miller was a managing agent.

"For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.'" (*White*, *supra*, 21 Cal.4th at p. 572.) "[O]n this record[,] the jury could not have made the finding that [Miller] was a managing agent, which finding is essential for the imposition of punitive damages against [Carnival]." (*Kelly-Zurian v. Wohl Shoe Co*. (1994) 22 Cal.App.4th 397, 421.)

Because we conclude that Farrow failed to present substantial evidence that Miller was a managing agent, we need not address Farrow's remaining arguments. (*Kelly-Zurian v. Wohl Shoe Co*., *supra*, 22 Cal.App.4th at p. 422.) Accordingly, we find the trial court properly granted Carnival's motion in limine.

DISPOSITION

The judgment is affirmed. Respondents to recover their costs on appeal.

NOT FOR PUBLICATION.

_____, J.

DOI TODD

We concur:

_____, Acting P.J.

NOTT

_____, J.

ASHMANN-GERST